

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

SHELLY FENDER,	:	
	:	No. 1:11-cv-412
Plaintiff,	:	
	:	
vs.	:	OPINION AND ORDER
	:	
Commissioner of Social	:	
Security,	:	
	:	
Defendant.	:	
	:	

This matter is before the Court on the Magistrate Judge's Report and Recommendation (doc. 8) and Plaintiff's objections thereto (doc. 9).

Plaintiff applied for Supplemental Security Income benefits, and on September 28, 2009, an administrative law judge denied her application. The Appeals Council then denied Plaintiff's request for review on November 30, 2010, and Plaintiff requested an extension of the 60-day statutory time limit for filing a federal complaint seeking review of the Commissioner's decision. On May 19, 2011, the Appeals Council granted Plaintiff an additional thirty days in which to file her complaint. Plaintiff's counsel received the letter authorizing the extension on May 24, 2011, making the new deadline for filing the complaint June 23, 2011. Plaintiff, however, tendered her complaint on June 24, 2011.

Defendant filed a motion to dismiss Plaintiff's complaint

on the basis that it was untimely filed (doc. 6). Plaintiff urges the Court to deny Defendant's motion, arguing that equitable tolling should apply to allow Plaintiff's day-late complaint to survive (doc. 9). The Magistrate Judge concluded that equitable tolling was not applicable here and recommends that Defendant's motion be granted (doc. 8).

This Court has reviewed the Magistrate Judge's Report and Recommendation and has considered all of the filings de novo. After careful evaluation of the record, the Court declines to adopt the recommendation of the Magistrate Judge.

The 60-day time limit in 42 U.S.C. § 405(g) is not jurisdictional, but a period of limitations which, consistent with congressional purpose, may be tolled when equity so requires. Bowen v. New York, 476 U.S. 467, 474 (1986). The Bowen court noted circumstances such as illness, accident, destruction of records, mistake, or a claimant's misunderstanding of the appeals process as circumstances under which the statute of limitations may be equitably tolled. Id. at n. 12. The Sixth Circuit uses a five-factor analysis in determining whether equitable tolling is appropriate, analyzing the following: "(1) the petitioner's lack of [actual] notice of the filing requirement; (2) the petitioner's lack of constructive knowledge of the filing requirement; (3) diligence in pursuing one's rights; (4) absence of prejudice to the respondent; and (5) the petitioner's reasonableness in remaining

ignorant of the legal requirement for filing his claim." Cook v. Comm'r of Soc. Sec., 480 F.3d 432, 437 (6th Cir. 2007).

Plaintiff's Complaint was filed in this Court one day (really, a little over nine hours) beyond the extension granted by the Appeals Council. The Court's review of this case reveals Plaintiff's diligence in pursuing her rights thus far. Plaintiff's counsel bears the blame here, both for miscalculating the time period in which to file her Complaint and for waiting until the last possible minute to do so, but there is no evidence of bad faith or malfeasance on her counsel's part. Under the circumstances present here, it would be fundamentally unfair to Plaintiff if her case were to be dismissed. In addition, given that the Complaint was filed a mere nine hours late, the Commissioner will not be prejudiced by permitting the Complaint to go forward. The Court thus finds that equitable tolling is appropriate in this matter.

Accordingly, the Court declines to adopt the recommendation of the Magistrate Judge (doc. 8). Defendant's motion to dismiss is hereby DENIED (doc. 6). This matter is returned to the Magistrate Judge so that it may proceed on the merits.

SO ORDERED.

Dated: May 8, 2012

s/S. Arthur Spiegel
S. Arthur Spiegel
United States Senior District Judge